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IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

QUALITY KING DISTRIBUTORS, INC.,
Petitioner,

v.

L'ANZA RESEARCH INTERNATIONAL, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and BRIEF OF *AMICUS CURIAE* THE AMERICAN FREE TRADE ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

AFTA respectfully moves for leave to file the brief *amicus curiae* submitted with this motion. *Amicus* has received consent from counsel for petitioner but not from counsel for respondent.

Amicus seeks to file its brief to make three points not addressed in the principal briefs:

1. Traditional theories of legal interpretation of case law and statute have been violated by the Ninth Circuit's decision. Issues of "full value" and Congressional intent are important to future decisions. These deviations from

past precedent infuse a high degree of uncertainty in the market place.

2. The parallel market which is directly affected by this decision is a huge market affecting many sectors of the United States economy. The many members of the *amicus*, which are involved in a wide variety of businesses nationwide, are faced with substantial insecurity in the conduct of their business. This insecurity is having a substantial effect on the national economy as a result.

3. A new international scheme for intellectual property enforcement and declining trade barriers is being established which is inconsistent with the protective nature of the present decision.

Since the members of the *amicus* associations conduct business throughout the United States, including the states covered by the Ninth Circuit, they are directly exposed to the consequences of this decision. *Amicus* faces serious financial and legal consequences if this decision is allowed to stand unchanged. Accordingly, *amicus* respectfully suggests that its brief will present to "the Court relevant matter not already brought to its attention by the parties. . ." (Rule 37.1)

For the above reasons *amicus* asks that this motion be granted.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* THE AMERICAN FREE TRADE ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The American Free Trade Association ("AFTA") is an incorporated trade association of independent American importers, distributors and wholesalers of parallel import fragrances, grooming products and cosmetics. Many of the Association's members are small businesses that are located throughout the United States and employ hundreds of American citizens.

Parallel imports, sometimes also referred to as "gray market" goods, are genuine trademarked consumer products, such as fragrances, cosmetics, hair and body care products, cameras, electronic products, and watches, which are typically manufactured abroad and imported by independent American importers rather than by "authorized" U.S. importers and distributors. Parallel imports exist because the manufacturers, for reasons of their own, seek significantly higher prices for their products in the United States than elsewhere in the world.

The *amicus* has a vital stake in the outcome of this case, and itself and some of its members have filed previous *amicus* briefs on similar issues.[1] The instant challenge under the Copyright Act is just one prong of a full-scale attack by some manufacturers who are attempting to eliminate the legitimate and beneficial competition presented by the parallel importation and re-importation of their own products. This is a strategy that has been unsuccessful through the use of trademark and patent rights.

[1] *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *Vivitar Corp. v. United States*, 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); *Olympus Corp. v. United States*, 792 F.2d 315 (2d Cir. 1986), *cert. denied*, 486 U.S. 1042 (1988); *Bell and Howell: Mimiya Co. v. Masel Supply Co.*, 719 F.2d 42 (2d Cir. 1983), *cert. denied*, 479 U.S. 950 (1987); *Johnson & Johnson Products, Inc. v. DAL International Trading Co.*, 798 F.2d 100 (3d Cir. 1986); *Sebastian International, Inc. v. Consumer Contracts, Ltd.*, 847 F.2d 1093 (3d Cir. 19866); *Cosmair, Inc. v. Dynamite Enterprises, Inc.*, 226 U.S.P.Q. 334 (S.D. Fla. 1985).

SUMMARY OF THE ARGUMENT

The Ninth Circuit and the Third Circuit are in direct conflict in their interpretation of the relationship between the first sale doctrine found in 17 U.S.C. §109 and the import restriction found in 17 U.S.C. §602. According to the Ninth Circuit below, absent permission of the U.S. copyright holder, the importation and subsequent distribution of foreign bought products bearing a U.S. copyright constitutes infringement, even when the copyright owner itself has already sold the same goods and earned a return on that sale. The Court concluded that the first sale doctrine does not apply to products imported into the United States. In other words, the copyright owner has a complete and absolute right to control importation of products bearing his or her copyright even if he has previously sold the copy of the product and made a profit from the sale. Such an expansive interpretation effectively abolishes the first sale doctrine for foreign bought products bearing U.S. copyrights, engenders market manipulation and is inconsistent with analogous decisions under our patent and trademark laws.

By contrast, the Third Circuit in *Sebastian International v. Consumer Contacts Ltd., infra,* held that the first sale by a copyright holder extinguishes the copyright regardless of the place of sale. This is the better rule, since it preserves the traditional balance between the copyright holder's right to earn a just return and the policy against unduly restricting free alienation of property.

The Ninth Circuit's reading of a location of sale requirement into the copyright laws is simply unwarranted and unsupported by the statutory text or legislative history. The first sale doctrine, although codified, "finds its roots in the common law aversion to limiting the alienation of personal property." *Sebastian, infra.* Although the copy-

right law has undergone enormous changes since its original enactment, at no point has Congress chosen to modify the language of the statute to incorporate a territorial restriction for the first sale doctrine. The Ninth Circuit's interpretation of the statute's relation to the import restriction is therefore not consistent with Congressional intent and expands the import restriction beyond its proper scope.

Finally, this decision significantly impacts the *amicus curiae*, American consumers and the American economy. By adopting an interpretation at odds with other Circuits, the Ninth Circuit renders *amicus* open to contradictory and inconsistent legal liability and undermines their ability to market and distribute nationally. The *amicus curiae* strongly urge the Court to grant *certiorari* on this important national issue.

ARGUMENT

I.
THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH THE THIRD CIRCUIT.

The Ninth Circuit's decision in the instant case is in express and direct conflict with the Third Circuit's decision in *Sebastian International, Inc. v. Consumer Contacts, Ltd.*, 847 F.2d 1093 (3d Cir. 1988). The conflict arises from the differing interpretation of the relationship between 17 U.S.C. §602(a) ("the import restriction") and 17 U.S.C. §109(a) ("the first sale doctrine"). The Ninth Circuit below determined that the First Sale doctrine does not apply to goods imported into the United States because, in its opinion, to do otherwise would render §602 meaningless. In so ruling the Ninth Circuit recognized that it was in express conflict with the ruling

in *Sebastian*. ("We decline to follow the approach taken by the Third Circuit in Sebastian").

The Third Circuit's ruling in *Sebastian* is clearly inconsistent and irreconcilable with the ruling in this case since in it the Court states that "the **place of sale is not the critical factor** in determining whether section 602(a) governs." *Sebastian*, 847 F.2d at 1099. (emphasis added) The first sale of a copy of the product "by the copyright owner extinguishes any right later to control the importation of those copies." *Id.* Furthermore, *Sebastian* expressly contradicts the holding that an infringement was committed upon importation of the foreign purchased product since it states that "a first sale by the copyright holder extinguishes any right later to control importations of those copies." *Id.*

Our patent and trademark laws have followed a reasoning similar to that in *Sebastian*. The patent monopoly is deemed waived with respect to a particular patented item once it is sold whether it is sold domestically or abroad. *See, Kabushiki Kaisha Hattori Seiko v. Refac Dev. Corp.*, 690 F. Supp. 1339 (S.D.N.Y. 1988). Similarly, this Court has recognized that trademarked goods purchased abroad or domestically from the trademark holder or a related company may be freely imported into this country and resold consistent with the Tariff Act. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988).

Despite the Ninth Circuits' efforts to find a new approach to justify its decision,[2] it is easily apparent upon review that the ruling in *Sebastian* is reasonable and can be consistently read with legal precedent dealing with copyright and other areas of intellectual property

[2] Compare *BMG Music v. Perez*, 952 F.2d 318 (9th Cir. 1991), *cert. denied*, 120 L.Ed.2d 873 (1992) with *Parfums Givenchy v. Drug Emporium*, 38 F.3d 477.

law. The valid purpose of excluding genuine product for which the copyright owner has not received a reward, such as stolen goods, serves as sufficient independent purpose for §602 without invalidating the long standing principle set forth in §109. Moreover, such a reading would be consistent with new economic integration and free trade treaties recently signed by our government. It is important and essential that this Court grant *certiorari* and review the decision below.

II.
THE UNUSUAL LEGAL, ECONOMIC, AND POLICY SIGNIFICANCE OF THE INSTANT DECISION JUSTIFIES *CERTIORARI* REVIEW.

The parallel market has existed and grown in the United States for a great many years. *See, K Mart.* It is both a significant entity in its own right, as well as an important source of affordable quality merchandise for U.S. consumers. Over the course of the last 50 years a very careful balance has been created to protect the legitimate interests of intellectual property right holders to receive compensation for their efforts without encouraging obstacles to free trade competition. To allow copyright owners to exploit §602 to engage in discriminatory price manipulation in different national markets defeats efforts at free competition and trade. The Ninth Circuit decision not only upsets this delicate balance, it also promotes the immediate nationwide disruption, and possible destruction, of the parallel market. This raises serious legal, economic and policy considerations which this Court should address.

A. Legal Considerations.

1. Unwarranted Inquiry into Value of Exchange.

While the import restriction in §602 was certainly designed to provide at least some greater protection for the copyright holder, nothing on the face of the statute suggests that it is intended to allow a copyright holder to restrain trade, after he has received a "reward" for his copyright. When a copyright holder directly or through a related company sells a work overseas, he is receiving his fair "reward." The mere importation of a work by the purchaser does not mean that the copyright holder did not receive a "reward" for his copyright. *Cosmair, Inc. v. Dynamite Enterprises, Inc.*, 226 U.S.P.Q. 344 (S.D. Fla. 1985); *Red Baron Franklin Park v. Taito Corp.*, 9 U.S.P.Q. 2d 1901 (E.D. Va. 1988), *rev'd on other grounds*, 883 F.2d 175 (4th Cir. 1989), *cert. den.*, 493 U.S. 1058 (1990); *Sebastian International*, 847 F.2d 1093 at 1099. This legitimate importation is the business of the parallel market.

It is a basic maxim of contract law that "the adequacy of consideration is not a proper subject for judicial scrutiny." E. Allan Farnsworth, FARNSWORTH ON CONTRACTS, 99 (1990). The Ninth Circuit itself affirmed this general principle with regards to Copyright sales in *Denbicare U.S.A. Inc. v. Toys "R" Us, Inc.*, 84 F.2d 1143 (9th Cir. 1996) where it held that when a copyright owner consents to the sale of a product bearing his or her copyright it constitutes a valid first sale regardless of the value received by the copyright owner. The Ninth Circuit's new ruling in this case overturning *Denbicare* and challenging whether the consideration justified the exchange opens a Pandora's box for factual inquiries in millions of copyright transactions. How can the purchaser, distributor or reseller know if he or she paid enough to satisfy the

Ninth Circuit that the copyright owner received his fair value for the product? Clearly this legal morass is one which the court should avoid.

2. Forum Shopping.

A second legal concern raised by the present state of affairs is the invitation to forum shopping created by the split in the jurisdictions. As will be argued below, the Ninth Circuit has clearly become the forum of choice for Copyright owners and licensees who wish to discourage national competition by legitimate parallel market importers. The split between the circuits permits this strategic selection of forums and increases market uncertainty.

B. Economic Considerations.

1. Economic Impact of Parallel Market.

Ths parallel market represents a significant portion of the U.S. economy, involving practically the entire range of consumer products. In terms of fragrances which are closely related in sales and market to the products which are the subject of the instant litigation, industry lobbying organizations estimate that 25% of the market consists of parallel merchandise. *Unable to Protect Product Trademarks, Manufacturers Copyright the Boxes,* NEW YORK TIMES, November 24, 1994. In total, the parallel market constitutes a multi-billion dollar industry nationwide. *Circuit Prohibits Import of Gray-Market Goods,* THE NATIONAL LAW JOURNAL, January 27, 1997. Hair care products, however, are only a small portion of a large industry which includes cosmetics, household goods, games and home electronics. In short, we doubt that Respondent will dispute the economic significance of the industry at issue.

2. Uncertainty in the Market Place.

We likewise doubt that Respondent would dispute the potential immediate nationwide impact of the Ninth Circuit decision. Within less than a month after the previous Ninth Circuit decision on this subject matter, *Parfums Givenchy v. Drug Emporium, Inc.,* 38 F.3d 477 (9th Cir. 1994), Givenchy filed suit against K Mart Corporation, Sears Roebuck & Co., Wal-Mart Stores, Inc., Marshall's Inc., Loehmann's, Inc., and six other defendants. *Parfums Givenchy, Inc. v. K Mart, et al.,* Case No. 94-7647, United States District Court for the Central District of California. This litigation, which was filed against essentially all of the major discount retailers in the United States, sought a permanent nationwide injunction preventing the distribution and sale of the brand perfume at issue. *See also, Estee Lauder v. Wal-Mart,* Case No. CV 94-3277 (C.D. Cal. 1994) (Seeking an injunction under the same copyright theory.) These actions were settled prior to trial due to the inflexible nature of the Ninth Circuit court's rulings with regards to parallel market resellers. Since these actions numerous other claims and threatened claims have followed in the Ninth Circuit including the present claim.

Based on the present decision and its predecessors, the Ninth Circuit's interpretation of the law can affect not just a nationwide restriction on the parallel market for hair care products, but for the entire range of consumer products. A decision which has the potential to destroy an entire industry of this economic significance deserves a most thorough review.

C. Policy Considerations.

Cases which involve serious policy considerations which alter long-standing interpretations of statutes and threaten to damage broad national markets should be decided by Congress. The ruling below, because of its implication to the entire parallel market, raises "serious policy considerations [which] weigh on both sides of this debate." *Parfums Givenchy v. Drug Emporium, Inc.*, 38 F.3d at 481 n.6. Other Courts have recognized these considerations in similar areas of law and refused to enter anti-competitive rulings. The packages of hair care products at issue and their contents could have been protected with a patent or a trademark. In each instance, however, Congress and the courts have rejected the application of these doctrines to the exclusion of legitimate parallel market merchandise. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *Kabushiki Kaisha Hattori Seiko v. Refac Technology Dev. Corp.*, 690 F. Supp. 1339 (S.D.-N.Y. 1988).

This support for free competition was evidenced in the reaction of Congress to the decision in *Red Baron*, 9 U.S.P.Q. 2d 1901 (E.D. Va. 1988), *rev'd on other grounds*, 883 F.2d 275 (4th Cir. 1989), *cert. den.*, 493 U.S. 1058. That case dealt with the purchase overseas, of a foreign made, copyrighted article, initially sold by the foreign copyright holder which was related to the U.S. copyright holder. The District Court refused to grant in injunction, finding that the "first-sale" by the related copyright holder under §109 overrode the import restriction in Section 602. *Id.* The Circuit Court overturned this decision, not based upon the import restriction, but rather based on the fact that the public use of the copyrighted material violated the "performance right." *Id.* 883 F.2d at 281.

In 1990, Congress specifically amended the copyright statute to overturn the effect of the ruling in *Red Baron*. See P.L. 101-650 §103 and discussion in 1990 U.S. CODE CONG. & ADMIN. NEWS 6935, 6945. Although Congress created certain exceptions to the "first-sale" doctrine, it did not choose to modify the interpretation employed by the *Red Baron* District Court. This creates a presumption that Congress accepted the conclusions of the District Court that §602 does not supersede the first sale doctrine, which should now enjoy the force and effect of law. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982); *Wehrly v. United States*, 808 F.2d 1311 (9th Cir. 1986). We should not presume that Congress did a useless thing. *Nobel v. TVA*, 892 F.2d 1013 (Fed. Cir. 1989); NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, §49.11, at 83 (5th ed. 1992).

The Ninth Circuit below rejects this argument on the basis that, "in amending §109(e) [first sale doctrine], Congress was concerned about the relationship between the first sale doctrine and §106(4), not the relationship between the first sale doctrine and §602(a)." Despite its present posture, the Ninth Circuit has previously stated that Congress is deemed to know existing case law to which it is addressing legislation since "[w]e may fairly presume that Congress is aware of the common-law background against which it legislates[.]" *Chappell v. Robbins*, 73 F.3d 918 (9th Cir. 1996); *see also, Nordgren v. Burlington N. R.R.*, 101 F.3d 1246 (8th Cir. Minn. 1996), *reh'g. en banc denied, Nordgren v. Burlington N. R.R.*, 1997 U.S. App. LEXIS 800 (8th Cir. Jan. 16, 1997); *Roche Prods. v. Bolar Pharmaceutical Co.*, 733 F.2d 858 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 856 (1984); *Webster v. City of Houston*, 689 F.2d 1220 (5th

Cir. 1983). More significantly, if Congress had shared the Ninth Circuit's view it would have resolved the issues under both 106(4) and 602 by amending the statute to limit §109 as suggested.

Thus the actions of Congress in 1990 should be read as affirming the lower court opinion in *Red Baron* and the holding of the Third Circuit in *Sebastian*. Since, at worst, the Congress acquiesced to those decisions, the observation of the Third Circuit in 1988 is especially pertinent:

> This twist has created the anomalous situation in which the dispute at hand superficially targets a product's label, but in reality rages over the product itself. We think that **the controversy over "gray market" goods, or "parallel importing," should be resolved directly on its merits by Congress, not by judicial extension of the Copyright Act's limited monopoly.**

Sebastian, 847 F.2d at 1099. (emphasis added)

CONCLUSION

For the foregoing reasons, this Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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